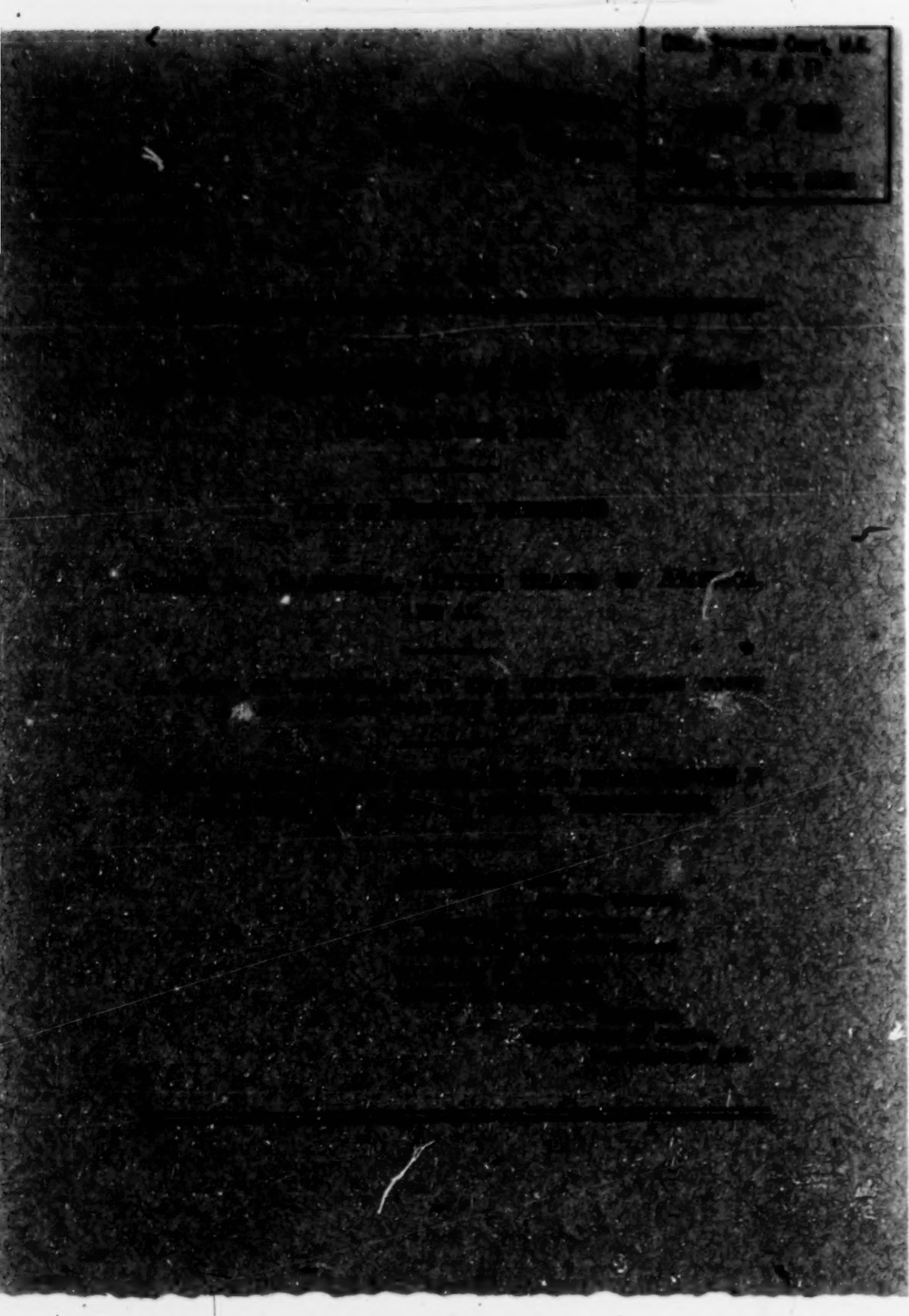

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CITATIONS

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Statutes—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 51

CITY OF FRESNO, PETITIONER

v.

STATE OF CALIFORNIA, UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND H. P. DUGAN, EDWIN F. SULLIVAN, AND JAMES M. INGLES, RESPONDENTS

OPINIONS BELOW

The opinion and supplemental opinion of the district court (R. VII: 22–282, 287–293) are reported *sub nom. Rank* v. *Krug* (*United States*) at 142 F. Supp. 1–198. The opinion of the court of appeals, as corrected, and its opinion denying the City of Fresno's petition for rehearing (R. VII: 364–394, 397–400) are reported *sub nom. California* v. *Rank* at 293 F. 2d 340. Its opinion on rehearing (R. VII: 400) is reported at 307 F. 2d 96.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1961 (R. VII: 395). The City of Fresno's timely petition for rehearing was denied on August 14, 1961 (R. VII: 396). On November 3, 1961, Mr. Justice Douglas extended the time for the City of Fresno to file a petition for a writ of certiorari to December 12, 1961 (R. VII: 404). The petition was filed on December 11, 1961, and was granted on April 2, 1962 (R. VII: 405). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Congress, by consenting to joinder of the United States in suits for general adjuication of all water rights in a river system, waived its sovereign immunity with respect to a suit against it for an order enjoining the operation of a federal reclamation project or directing it to construct certain public works.

2. Whether a suit for a judicial declaration (1) that the plaintiff has water rights superior to those of the United States, and (2) that the plaintiff is entitled to receive water from the United States at a certain price, is a suit against the United States and hence, if not consented to, barred by sovereign immunity.

STATUTES INVOLVED

Section 208(a) of the Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666, provides:

> 208. (a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that

the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

* * * * *

Section 9(c) of the Reclamation Project Act of August 4, 1939, 53 Stat. 1193, as amended, 43 U.S.C. 485h(c), provides in relevant part:

(c) The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract, either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in

which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper * * *. No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judg-

ment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.

STATEMENT

This case arises out of the same litigation as *Dugan* v. *Rank*, No. 31, this term. As set out more fully in our brief in that case, the suit from which both cases stem was instituted by a number of users of water from the San Joaquin River (1) to enjoin certain local officials of the Bureau of Reclamation (the individual respondents herein)[1] from interfering, by means of the Bureau-administered Central Valley Project, with their water rights, or (2) to obtain a "physical solution" that would provide them with water to meet their needs. Subsequently the United States (over its objection that it was immune from suit) was joined as a necessary party defendant, and petitioner herein, the City of Fresno, intervened as a party plaintiff. The district court entered a decree enjoining the further operation of the Project in such a way as to interfere with plaintiffs' rights, unless a specified "physical solution" should be undertaken by the government. The court of appeals dismissed as to the United States and affirmed as to the officials. It is the officials' petition for review of that ruling that is involved in No. 31.

The present case relates primarily to certain ancillary relief sought by Fresno in connection with its alleged need for an additional water supply for municipal purposes. In its complaint, Fresno requested,

[1] The Secretary of the Interior and the Commissioner of the Bureau of Reclamation were also named in the complaint but were not served and did not appear.

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in addition to the injunctive relief described above, (1) a declaration that it has water rights which are superior to those of the United States and which must therefore be satisfied before the United States diverts any water from the area, and (2) a declaration that it is entitled to receive Project water from the United States at the same rate charged for water delivered for irrigation purposes ($3.50 per acre-foot for Class I water and $1.50 per acre-foot for Class II water[2]), rather than the rate of up to $10.00 per acre-foot proposed to be charged for municipal water by the Department of the Interior.

The district court concluded (R. VII: 270) that Fresno "is entitled to a declaratory judgment that its rights for domestic and municipal purposes are superior to any right of the United States to divert water beyond the watershed or county of origin"; and that, while Fresno is "not presently in a position to enforce its rights" because it has not constructed any diversionary or conduit works or reservoirs, "[i]f, as, and when the City of Fresno is in a position to take and receive the water, it will then be sufficient time to enforce that right by an appropriate decree under the provisions of Section 2202 of Title 28, United States Code."[3] The court's conclusions of law and judgment provide that, upon constructing the necessary works, Fresno will be entitled to an appropriate injunction

[2] Class I water is water for which a firm supply is contracted, and Class II water is additional water that is made available (R. VII: 270).

[3] This section provides for further relief in Federal Declaratory Judgment Act proceedings.

against the United States (R. III: 956–957, 1014–1017). The district court also concluded (R. VII: 271) that Fresno

> is entitled to a declaratory judgment that any charge for water which may be made by the United States should be reasonable. Reasonableness, in light of the facts and the Federal Reclamation Act and the Statutes of California, requires that such charges should be no more than the Irrigation Districts are charged from time to time for Class I water.

The court of appeals set aside the judgment of the district court "insofar as it relates to the terms upon which the City of Fresno is entitled to receive water from the United States at Friant Dam" (R. VII: 394). With respect to Fresno's claim of a right to receive water at a certain rate the court stated (R. VII: 381):

> In negotiating and contracting for the delivery of water from Friant Dam, defendant officials were acting within the scope of their statutory authority and were carrying out the duties imposed upon them by their official positions. It is their administrative function to determine the rates at which water shall be delivered. It cannot be said that their statutory authority is limited to the making of such determinations as the courts may find to be reasonable. The complaint of Fresno in this regard is a complaint against the United States and this dispute may not be entertained judicially without a waiver of sovereign immunity on the part of the United States.

With respect to the district court's conclusion that Fresno had water rights superior to those of the United States, the court below found it unnecessary to decide that question because, in any event (R. VII: 383):

> Fresno has * * * no vested right to command the services of the United States in receiving its waters. The terms upon which the United States is willing to act in this respect remain an administrative decision which it is within the authority of the defendant officials to make.

In denying Fresno's petition for rehearing, the court elaborated upon the latter holding by stating that, to the extent Fresno claimed rights to the natural flow of the river superior to those of the United States (R. VII: 399):

> If and when such rights have been established in accordance with state law, Fresno may be able effectively to protest the impounding of waters by these defendants in contravention of such rights. But this is speculation upon future events and future issues and decision must await the occurrence and the dispute.

However, the court assumed that what Fresno was claiming was a right to Project water. As to that, the court stated (R. VII: 399–400):

> If Fresno is to have such water or is to enjoy the benefits of Friant storage or the delivery service of the United States, the terms upon which it may do so are not (for the reasons expressed in our opinion) appropriate issues in

this action against the individual officers of the bureau.*

SUMMARY OF ARGUMENT

I

The United States has not waived its immunity from a suit where, as here, the relief sought is an injunction against the operation of a federal reclamation project or, alternatively, a direction to construct certain public works. Section 8 of the Reclamation Act of 1902 was not such a waiver. The provision of that section that the Secretary of the Interior

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* A contract for the provision of Project water to Fresno has recently been executed between the City and the United States. It provides that each year the United States will deliver water from Friant Dam to Fresno at a graduated rate of increase from 5,000 acre-feet the first year to a maximum of 60,000 acre-feet annually at the end of 29 years; each year Fresno is to be advised of the rate of payment for that year, "but in no event shall the rate so announced be in excess of Ten Dollars ($10) per acre-foot" (para. 3(a)). It also provides:

> 12. (a) Nothing in this contract shall be construed as affecting the rights of the parties to or concerned in that certain action entitled (*State of California, United States of America, et al.*, v. *Rank, et al.* (No. 15840) now on appeal in the Circuit Court of the United States in and for the Ninth Circuit.
>
> (b) In the event any of the provisions of this contract shall be contrary to any issue as finally decreed in said *State of California, United States of America, et al.*, v. *Rank, et al.*, then this agreement shall be amended to comply with the said final decree: *Provided, however*, That in any event the City shall be entitled to the amount of water specified in Article 3 hereof or such amount as may be decreed in *State of California, United States of America, et al.* v. *Rank, et al.*, whichever amount is the larger.

shall proceed in conformity with state water-rights law means only that state law defines the property interests that must be acquired if and when the government exercises its paramount power of eminent domain.

Nor did Section 208(a) of the Act of July 10, 1952, constitute such a waiver. Congress there consented to the joinder of the United States in suits "for the adjudication of rights to the use of water of a river system or other source, or * * * for the administration of such rights." As the legislative history of this provision demonstrates, it refers to a quasi-public proceeding, familiar in the law of western States, for the general adjudication of the reciprocal water rights of all claimants in an entire river system.

In enacting Section 208(a), Congress was at pains to disclaim any purpose of allowing it to be used to interefere with the operation of reclamation projects. Furthermore, the present suit is not of the type contemplated by Section 208(a) for the reasons (1) that not all claimants to the water supply involved have been joined, (2) no determination of the rights of each claimant as against each other claimant was sought or granted, and (3) the suit does not embrace an entire river system. Since the United States has not consented to this suit, it is barred by sovereign immunity.

II

Fresno's claims for judicial declarations (1) that it has certain additional water rights superior to those of the United States, and (2) that it is entitled to

receive such water from the United States at a given price, are barred by sovereign immunity. Such declarations of rights as against the United States operate directly against the sovereign; they cannot be prosecuted without its consent.

Fresno's claim of a right to receive water at a given price is based on the fact that the price proposed to be charged for municipal water is higher than that charged irrigators. Such a differential has been expressly authorized by Congress, which provided that municipalities may be charged interest (which irrigators are not) and that they must pay an "appropriate share" of project costs. Moreover, Congress has been kept fully aware of the Secretary of the Interior's policy of charging municipalities higher rates than irrigators. In view of the fact that the prime purpose of the reclamation laws and projects is to promote irrigation, neither the congressional authorization of this differential nor its implementation by the Secretary is unreasonable.

ARGUMENT

I. THE UNITED STATES HAS NOT CONSENTED TO THE CLAIMS FOR RELIEF OF FRESNO AND THE OTHER PLAINTIFFS

Although it also made certain special claims for relief which we discuss later in this brief,[5] the City of Fresno sought the same relief as that sought by the other plaintiffs in this proceeding and granted by the district court—an injunction against the operation of the federally constructed and maintained Central Valley Project, unless the government should

[5] See pp. 22–36, *infra*.

undertake a "physical solution" consisting of the construction of specified public works. For the reasons set forth in detail in our brief in *Dugan* v. *Rank*, No. 31, this claim for relief is barred by sovereign immunity, and the district court was without jurisdiction to entertain it.

Fresno urges, however, that the United States has waived its sovereign immunity, by virtue either of Section 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. 383 (Fresno Br. 122–123), or of Section 208(a) of the Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666 (Fresno Br. 116–121). The court below was clearly correct in holding that neither of these Acts of Congress constituted a consent by the United States to this suit (R. VII: 372, 376; see also R. VII: 385).

There is no basis whatever for inferring a waiver of immunity from Section 8 of the Reclamation Act of 1902, which provides that the Secretary of the Interior "shall proceed in conformity" with state laws relating to "the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder." As this Court held in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 291, that provision means simply that state law defines the property interests that must be acquired if and when the government exercises its paramount power of eminent domain. See Pet. Br., *Dugan* v. *Rank*, No. 31, p. 26, n. 12; see also R. VII: 385. Nor did any member of this Court suggest the contrary in *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, as Fresno

contends (Fresno Br. 122). Both the Court and Mr. Justice Douglas, in his separate opinion, read Section 8 as assuming that the United States had waived its immunity with respect to a suit for *damages* for a taking of state-defined property interests, 339 U.S. at 739, 757, 758, but there is nothing in either opinion in that case to support an assertion that the government waived its immunity from judicial interference with the administration of the Central Valley Project. See *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 703.*

Section 208(a) of the 1952 Act, *supra*, provides in relevant part that

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. * * *

The court of appeals, after detailed consideration, rejected the contention of Fresno and other plaintiffs that this provision constitutes a waiver of sovereign immunity with respect to the present suit. (R. VII: 372–376). Its ruling, we submit, is plainly correct.

Preliminarily we note that this Court has long adhered to the view that it should not "extend the waiver of sovereign immunity more broadly than has

* See p. 14, *infra*.

been directed by the Congress." *United States* v. *Shaw*, 309 U.S. 495, 502; *Belknap* v. *Schild*, 161 U.S. 10, 16; *Minnesota* v. *United States*, 305 U.S. 382, 387. And while the Court suggested in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, that perhaps sovereign immunity should be given relatively limited scope in relation to suits for damages (337 U.S. at 703–704), it emphasized that

> [i]t is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right.

So here, especially where a suit for damages under the Tucker Act was available to plaintiffs (see Pet. Br., *Dugan* v. *Rank*, No. 31, pp. 9, 31), there is no occasion to broaden the waiver in Section 208(a).

Furthermore, Section 208(a) was not enacted until almost five years after this suit was instituted in 1947, and the government was not brought into the case in alleged pursuance of this provision until 1953, after most of the evidence in the case had been received (see Pet. Br., *Dugan* v. *Rank*, No. 31, pp. 9, 11). Under the circumstances, we submit that Section 208(a) could not govern this suit. As the Court has pointed out, "Retroactivity, even where permissible, is not favored, except upon the clearest mandate."

Claridge Apartments Co. v. *Commissioner*, 323 U.S. 141, 164. Where Congress has wished to waive sovereign immunity retroactively, it has done so in no uncertain terms. See Federal Tort Claims Act, 28 U.S.C. 2401. However, neither expressly nor impliedly does Section 208(a) provide for the joinder of the United States in suits instituted before its enactment—let alone in suits in which most of the evidence had already been taken.

The clearest reason for the nonapplicability of Section 208(a) to this case—and the reason on which the court below based its ruling that the United States had not consented to this action—is that Section 208(a) was intended to apply to a wholly different kind of suit. The court of appeals covered the matter succinctly (R. VII: 373):

> There can be little doubt as to the type of suit Congress had in mind. It was not a private dispute between certain water users as to their conflicting rights to the use of waters of a stream system, rather, it was the quasi-public proceeding which in the law of western waters is known as a "general adjudication" of a stream system: one in which the rights of all claimants on a stream system, as between themselves, are ascertained and officially stated.

The most notable characteristics of such a suit, which is an action *sui generis*, are (1) that all known claimants to the water supply involved must be joined, (2) that the rights of each of them as against each of the others must be determined by the final decree, and (3) that it embrace an entire river, stream or

other such system. See, *e.g.*, *Pacific Live Stock Co.* v. *Oregon Water Board*, 241 U.S. 440, 447–449; *Holbrook Irrigation District* v. *Fort Lyon Canal Co.*, 84 Colo. 174, 195, 269 Pac. 574, 582; *State ex rel. Hinckley* v. *Sixth Judicial District Court*, 53 Nev. 343, 352, 1 P. 2d 105, 106; *Hough* v. *Porter*, 51 Ore. 318, 439, 98 Pac. 1083, 1109; *Spanish Fork West Field Irrigation Co.* v. *District Court of Salt Lake County*, 99 Utah 527, 536, 104 P. 2d 353, 357; *People of the State of California* v. *United States*, 235 F. 2d 647, 663 (C.A. 9); *Washington State Sugar Co.* v. *Sheppard*, 186 Fed. 233, 235–236 (D. Idaho); *In re Silvies River*, 199 Fed. 495, 503 (D. Ore.). See also 2 Wiel, *Water Rights in the Western States* (3d ed.), pp. 1120–1125.

That Section 208(a), in speaking of a suit "for the adjudication of rights to the use of water of a river system or other source," was referring to a very specific and well-known kind of action in western water law is fully confirmed by its legislative history. In explaining the type of suit contemplated by this provision, the Senate Report on the bill (S. 18, 82d Congress) quoted as follows from this Court's decision in *Pacific Live Stock Co.* v. *Oregon Water Board*, *supra*, 241 U.S. at 447–448:

> All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end: First, that the waters may be distributed, under public supervision, among the lawful claimants according

> to their respective rights without needless waste or controversy; Second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses with its recognized infirmities and uncertainties; and, Third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators.

S. Rep. No. 755, 82d Cong., 1st Sess. 5 (1951). Senator McCarran, the sponsor of the bill and Chairman of the Senate Judiciary Committee, stated that the provision "is not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value." Letter to Sen. Magnuson, set forth in S. Rep. No. 755, *supra*, at p. 9.

It is particularly relevant to note that Congress disavowed any purpose of having Section 208(a) used to interfere with the administration of federal projects. Thus, when Senator Magnuson raised the question whether the provision could be used to delay or block a multiple-purpose development such as the then-pending proposed Hells Canyon project on the Snake River, Senator McCarran replied: "S. 18 is not intended to be used for the purpose of obstructing the project of which you speak or any similar

projects * * *." Letter to Sen. Magnuson, *supra*, S. Rep. No. 755 at p. 9. And the Judiciary Committee in its report affirmed its desire "to repudiate any such intent," stating (S. Rep. No. 755, *supra*, at p. 6):

> Where reclamation projects have been authorized for the benefit of the water users and the public generally, they should proceed under the law as it exists at the present time and should the Government have reason to need the water of any particular user on a stream, that water should be obtained by condemnation proceedings as is already provided for by law. * * *

The holding of the court below that Section 208(a) is limited to such a general adjudication of rights in a stream system follows the uniform view of the appellate courts that have passed on the provision. In *Miller* v. *Jennings*, 243 F. 2d 157 (C.A. 5), certiorari denied, 355 U.S. 827, 885, the court affirmed dismissal where, as here, an attempt was made by a suit against Bureau of Reclamation officials to establish claimed priorities as against the Elephant Butte Reclamation project. The same result was reached by the court below in *Nevada* v. *United States*, 279 F. 2d 699 (C.A. 9), where it affirmed dismissal of a suit for a declaratory judgment that the United States must secure State permission to develop water from wells at a naval installation.

The court below was clearly correct in holding that the present suit was not a "general adjudication" suit such as that contemplated by Section 208(a) (R. VII: 374–376). In the first place, not all of the known claimants to the water supply involved

have been joined in this action (R. VII: 375). While the plaintiffs numbered 14 individuals, one private corporation, one municipal corporation (Fresno) and one public corporation (the Tranquillity Irrigation District) (R. VII: 50), the district court found that "there are many hundreds of owners of property along the river and within the boundary lines of the alluvial cone" (R. VII: 224); indeed, the district court listed more than 200 affected land holdings in its findings (R. III: 900, 914, 919). There is certainly no basis for holding that all of these owners are now bound by the district court's findings.

Fresno attempts to circumvent the absence of these owners by characterizing this suit as a "class action." This argument, which was rejected by the Fifth Circuit in *Miller* v. *Jennings, supra*, 243 F. 2d at 160, was properly rejected by the court below (R. VII: 375). The theory of class action is wholly antithetical to the concept of a "general adjudication" suit, in which "[a]ll claimants are required to appear and prove their claims," *Pacific Live Stock Co.* v. *Oregon Water Board, supra*, 241 U.S. at 447. As the court below pointed out, even if all claimants of riparian and overlying rights could be treated as a class, claimants of appropriative or prescriptive rights could not, for the extent of such rights "must depend upon the circumstances of each individual case" (R. VII: 375); accordingly, as the court found, "[t]he claimants individually must be before the court" (*ibid.*). See, also, 2 Wiel, *Water Rights in the Western States* (3d ed.), p. 1120.

Nor is it any answer to ask the Court, as Fresno does (Fresno Br. 134), *now* to join other parties. Fresno made the same request of the court below, which correctly pointed out that such joinder could not "convert this action into a general adjudication of a stream system" (R. VII: 399). An entirely different kind of case was made on the pleadings and the proof; the joining of additional parties would require a new trial upon new pleadings and new evidence. We submit that it is now entirely too late to remedy the nonjoinder objection to considering this proceeding as a "general adjudication" suit.

The second reason this suit cannot be viewed as one for a general adjudication of rights in a stream system as contemplated by Section 208(a) is that it did not, nor was it designed to, determine the rights of each claimant against each of the others (R. VII: 375–376). The district court recognized as much: "*This is not* a suit wherein the plaintiffs seek to establish for each of them their separate rights *inter sese* to a given quantity of water as between themselves or as against one another" (R. VII: 27; emphasis in original); and, again: "this suit is not a case where the water users, either riparian or overlying, are seeking to enforce any separate or several rights among themselves or against one another, or to have a given amount of water declared and adjudicated to be the right for use on a specified tract of land" (R. VII: 220). Nor did the district court make the slightest attempt to adjudicate the rights of any owner in relation to any other, except to find that Fresno has certain rights "prior and superior to any right of the

United States" (R. III: 1016–1017; see pp. 22–23, *infra*). As the court below pointed out (R. VII: 376), there is not even an adjudication of the rights, as between one another, of the parties who were present and subject to the jurisdiction of the court.

The third reason this case is not a Section 208(a) suit for a general adjudication is that it is concerned, not with "the use of water of a river system or other source," but with the use of water in only one section of the San Joaquin River. The difference is not a technical one. A general adjudication suit must embrace an entire system of water from one source because "by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights" (S. Rep. No. 755, 82d Cong., 1st Sess., p. 5). Nor is it even arguable (Fresno Br. 130) that Friant Dam is an "other source" within the meaning of Section 208(a). The other sources to which a general adjudication suit might relate are such actual sources of water as lakes and swamps; the waters at issue in this case have their source in the San Joaquin system, not in Friant Dam. Moreover, this suit has at all times been concerned with the rights to San Joaquin River water that existed prior to the construction of Friant Dam.

In sum, as the court below held, the United States has not consented to the litigation against it of the claims of Fresno and the other plaintiffs for injunctive relief. Section 8 of the Reclamation Act of 1902 does not constitute such a consent, having no other effect than to leave to state law the definition of the interests the United States must take if it proceeds by

eminent domain. Section 208(a) of the Act of July 10, 1952, is not a waiver of immunity from the present suit, because that provision is concerned only with a suit for the general adjudication of rights to the use of water in a river system; the present case is not such a suit because not all known claimants to the water supply involved have been joined, no determination of the rights of each claimant against the others was sought or made, and the suit does not embrace an entire river system. In the absence of the consent of the United States, these claims are barred by sovereign immunity for the reasons set forth in our brief in *Dugan* v. *Rank*, No. 31.

II. THE CLAIMS OF FRESNO FOR DECLARATORY RELIEF ARE BARRED BY SOVEREIGN IMMUNITY

In addition to the claims Fresno made in common with the other plaintiffs in this proceeding (and which are discussed in our brief in *Dugan* v. *Rank*, No. 31, and at pp. 11–22, *supra*), it also sought, and was granted by the district court, judicial declarations (1) that it had certain additional water rights superior to those of the United States, and (2) that it was entitled to contract for water from the Central Valley Project at a certain price. The court of appeals properly held that these claims for relief were barred by sovereign immunity (R. VII: 381, 382; see also R. VII: 399–400).

A. THE CLAIM FOR A DECLARATION OF SUPERIOR WATER RIGHTS

By an amendment to its complaint, filed in August 1954, Fresno sought a declaratory judgment settling

its water rights as against the United States (R. II: 505–520). The district court, in its final judgment, declared that "the rights of the City of Fresno to secure surface water for domestic and municipal purposes from the San Joaquin River," over and above the rights it has in common with the other plaintiffs, "are prior and superior to any right of the United States * * * to divert and take any water of the San Joaquin River, or store the same for diversion, by means of Friant Dam, or Friant-Kern canal, or otherwise, out of the Counties of Fresno and/or Madera, and/or out of the watershed or area wherein the water of the San Joaquin River originates" (R. III: 1016–1017). The court of appeals held that, since the United States had not consented to this suit (R. VII: 376) and since the conduct of its officials in relation to Fresno's claim for additional water had been within their authority (R. VII: 383), the claim was barred by sovereign immunity (see also R. VII: 399–400).[7] This ruling was correct.

[7] This ruling assumed, with reason, that Fresno claimed a right to water from the Central Valley Project (R. VII: 399). The court also ruled that, if Fresno's claim was rather to water from the natural flow of the San Joaquin, that claim was premature, since Fresno had not perfected such rights in accordance with the procedures established by state law (R. VII: 399). In so ruling, the court was following the settled doctrine that the declaratory judgment procedure "may not be made the medium for securing an advisory opinion in a controversy which has not arisen" (*Coffman* v. *Breeze Corps.*, 323 U.S. 316, 324).

The relief sought and granted would operate directly upon the United States. In *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 689, n. 9, this Court noted that the plaintiff there had sought declaratory relief as to the validity of a sale to which it and the United States were parties. The Court observed that the request for such relief was "even more clearly directed at the sovereign" than the injunctive relief there sought, and it concluded that "[s]uch a declaration of the rights of the respondent *vis-à-vis* the United States would clearly have been beyond the court's jurisdiction" (*ibid.*). See also *Ogden River Water Users' Ass'n.* v. *Weber Basin Water Conservancy*, 238 F. 2d 936 (C.A. 10); *Hudspeth County Conserv. & Recl. Dist. No. 1* v. *Robbins*, 213 F. 2d 425, 432 (C.A. 5). So here, where a declaration of Fresno's water rights as against the United States was both sought and granted, the suit was for relief against the sovereign and was barred by the sovereign's immunity.

The district court also ruled that "upon the City of Fresno constructing the necessary transportation works to bring such supplemental supply of surface water of the San Joaquin River to said City of Fresno," it "will be entitled to an injunction restraining and enjoining" the United States (and the other defendants) "from diverting, or storing for diversion, by means of Friant Dam, or the Friant-Kern canal, or otherwise, any San Joaquin River water out of the watershed and the Counties of Fresno and/or Madera, or out of the area wherein the water of the San Joa-

quin River originates, until said supplemental water requirements of said City of Fresno are met * * *" (R. III: 1017–1018). Like the injunctive branch of the relief sought by and granted to all of the plaintiffs (see Pet. Br., *Dugan* v. *Rank*, No. 31, pp. 19–20), such a decree would obviously operate directly against the United States and interfere with its administration of a federal reclamation project. Such relief is plainly beyond the power of the court to grant as against the unconsenting sovereign. See *Larson* v. *Domestic & Foreign Corp.*, *supra*, 337 U.S. at 704; *Land* v. *Dollar*, 330 U.S. 731, 738.

Nor can the United States be said to have consented to the prosecution of Fresno's claim for declaratory relief by virtue of Section 208(a) of the Act of July 10, 1952, discussed at pp. 13–21, *supra*. Fresno's claim was by no stretch of the imagination a quasi-public suit for a general adjudication of water rights in a river system, such as Section 208(a) contemplates; Fresno sought nothing more, and the district court granted it nothing more, than a narrow declaration of its own rights as against those of one other claimant, the United States. As with the claims of all of the plaintiffs, this claim of Fresno's fell short of a Section 208(a) suit by (1) the absence of known claimants, (2) the lack of a determination of all the claimants' rights as among one another, and (3) the failure to embrace more than a limited stretch of a river. Accordingly, there is no basis for finding any such consent on the part of the sovereign as would waive its immunity from suit.

Since Fresno's claim is plainly barred by sovereign immunity, there is no occasion to inquire into the merits of the City's contention that it has water rights superior to those of the United States, and it was for that reason that the court below expressly declined to rule on Fresno's claim (R. VII: 383). There is another, even more cogent, reason for not inquiring into the merits of that claim—namely, that, whatever Fresno's rights may be, they are clearly subordinate to the federal power of eminent domain. As we have pointed out (see Pet. Br., *Dugan* v. *Rank*, No. 31, pp. 32, 42–46; see also pp. 12–13, *supra*), not only did the court below sustain the government's comprehensive power to take whatever water rights it needed for the Central Valley Project (R. VII: 384–387), but this Court has made it clear that the only restrictions on that power are that the government must respect state definitions of property taken and that it must pay just compensation therefor. See *Ivanhoe Irrigation District* v. *McCracken*, 339 U.S. 275, 291; *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725.* Thus, if any legitimate rights

* Fresno argues that the Act of Oct. 14, 1949, 63 Stat. 852, 853, which calls upon the Secretary of the Interior to "make recommendations [to Congress] for the use of water in accord with State water laws, including but not limited to such laws giving priority to the counties and areas of origin for present and future needs," limits the federal power of eminent domain (Fresno Br. 142). It is clear from the context of this provision (which was adopted at the suggestion of the Bureau of Reclamation, *Hearings, American River Basin Project, House Subcommittee on Irrigation and Reclamation*, 81st Cong., 1st Sess., pp. 35–36) that it refers to projects thereafter undertaken, not those already operative, such as the portion of the

of Fresno, as established in consonance with state law, have been or may in the future be interfered with by the federal government's operation of the Project, the City's remedy is a Tucker Act suit. The availability of that remedy provides Fresno with all of the constitutional protection to which it is entitled. *Hurley* v. *Kincaid*, 285 U.S. 95, 104; *Berman* v. *Parker*, 348 U.S. 26; see also Pet. Br., *Dugan* v. *Rank*, No. 31, p. 31.

B. THE CLAIM FOR A DECLARATION OF A RIGHT TO WATER AT A CERTAIN PRICE

Fresno also sought a judicial declaration that it was entitled to receive water from the Central Valley Project at the same price as that charged for irrigation water, rather than at the higher rate the Department of the Interior proposed to charge for water for domestic and municipal purposes. Pursuant to this request, the district court concluded that Fresno was entitled to a declaratory judgment that "any charge for water which may be made by the United States should be reasonable" and that "[r]easonableness, in light of the facts and the Federal Reclamation Act and the Statutes of California, requires that such charges should be no more than the Irrigation Districts are charged from time to time for Class I water" (R. VII: 271). The court below held that since the respondent officials were acting within their

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Central Valley Project at issue here. Furthermore, as we have shown (Pet. Br., *Dugan* v. *Rank*, No. 31, pp. 44–46), Congress was kept aware of the manner in which the United States was affecting existing rights by the operation of Friant Dam, and Congress fully ratified that conduct.

authority in determining the rates at which Project water should be sold, "[t]he complaint of Fresno in this regard is a complaint against the United States and this dispute may not be entertained judicially without a waiver of sovereign immunity on the part of the United States" (R. VII: 381), and, as the court had held (R. VII: 386), there had been no such waiver. This ruling, too, was correct.

Just as Fresno's claim for a judicial declaration of superior water rights is "clearly directed at the sovereign," *Larson* v. *Domestic & Foreign Corp., supra,* 337 U.S. 682, 689, n. 9 (see p. 24, *supra*), the City's claim for a judicial declaration of a right to contract for Project water is similarly a claim directly against the United States and similarly "would clearly have been beyond the court's jurisdiction" (*ibid.*). Moreover, the enforcement of such a right would, of course, require affirmative action by the United States through its officials—namely, the execution of a contract for the delivery of water to Fresno at the lower rate. Since this relief would thus "require affirmative action by the sovereign" and "compel it to act," *Larson* v. *Domestic & Foreign Corp., supra,* 337 U.S. at 691, n. 11, 704, it is barred by sovereign immunity.[*] Nor is this conclusion avoided

[*] Similarly, since affirmative action would be required of the Secretary of the Interior, who is the officer empowered by statute to execute such contracts, Reclamation Project Act of 1939, Section 9(c), 53 Stat. 1193, as amended, 43 U.S.C. 485h(c), the Secretary (who was not served and did not appear, see note 1, p. 5, *supra*) is clearly an indispensable party under *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, and *Williams* v. *Fanning*, 332 U.S. 490. Fresno's reliance on *Work* v. *Lou-*

by the fact that the relief was granted in terms of a "right"; sovereign immunity cannot be evaded by couching relief sought in terms of a declaration of a right to enter into a contract containing certain terms, rather than by directing a mandatory injunction to compel government officers to contract on those terms. *Love* v. *United States*, 108 F. 2d 43, 50 (C.A. 8); *Anderson* v. *United States*, 229 F. 2d 675 (C.A. 5); cf. *Blackmar* v. *Guerre*, 342 U.S. 512, 515–516.

Fresno seems to argue (Fresno Br. 92–115) that the doctrine of sovereign immunity does not apply here because it would be beyond the statutory (and perhaps even constitutional) authority of the respondent officials to charge Fresno more for municipal water than it charges other users for irrigation water. The court below disposed of any such contention thus (R. VII: 381):

> In negotiating and contracting for the delivery of water from Friant Dam, defendant officials were acting within the scope of their statutory authority and were carrying out the duties imposed upon them by their official positions. It is their administrative function to determine the rates at which water shall be delivered. * * *

Fresno has come forward with no adequate basis for challenging that conclusion.

Any constitutional attack on the federal charges for the use of Project water, as implemented by the respondent officials, is wide of the mark. Section 3,

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isiana, 269 U.S. 250 (Fresno Br. 99), points up the necessity of joinder of the Secretary, since that case was a mandamus proceeding against the Secretary of the Interior.

Article IV, of the Constitution imposes exclusive and unlimited authority upon Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," see *Sioux Tribe* v. *United States*, 316 U.S. 317, 324; *United States* v. *San Francisco*, 310 U.S. 16, 29. The power thus granted to manage federal reclamation facilities plainly embraces the authority to regulate charges for the benefits resulting from their operation. Irrespective of where title to the water stored and distributed by the government's reclamation facilities lies (see Fresno Br. 96–98), their operation for the benefit of the public bestows a federal privilege, and "the power of the Federal Government to impose reasonable conditions on the use of * * * federal privileges" is, as this Court observed in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 295, "beyond challenge * * *." See also *Yuma County Water Users' Ass'n* v. *Schlecht*, 262 U.S. 138, 145–146; *Swigart* v. *Baker*, 229 U.S. 187. As we show below, in view of the prime purpose of the reclamation legislation to promote irrigation, it was entirely reasonable for Congress to determine that users of reclamation project water for irrigation should pay a lower rate than users for municipal, industrial or power purposes.

The original act authorizing the construction and operation of federal reclamation projects, the Reclamation Act of 1902, Section 4, 32 Stat. 389, 43 U.S.C. 461, provided that charges for irrigation water "shall be determined with a view of returning to the recla-

mation fund the estimated cost of construction of the project, and shall be apportioned equitably." [10] This Court, in *Swigart* v. *Baker, supra,* 229 U.S. at 197–199, held that the cost of maintaining the project was also properly taken into account in determining the charges for irrigation water. In that case the Court also recognized that interest on the amount of construction costs that have not been returned to the reclamation fund is not charged users of irrigation water. 229 U.S. at 197; see also *Ivanhoe Irrigation District* v. *McCracken, supra,* 357 U.S. at 295.

The first provision for the supplying of water from reclamation projects to others than irrigators was Section 4 of the Town Site Act of 1906, 34 Stat. 116, 43 U.S.C. 567, which authorized the Secretary of the Interior to provide "towns or cities on or in the immediate vicinity of irrigation projects" with project water and to fix charges for such water which "shall not be less nor upon terms more favorable than those fixed * * * for the irrigation project from which the water is taken." This implicit authority to charge municipalities higher rates than those paid by irrigators was made explicit by Section 9(c) of the Reclamation Project Act of 1939, 53 Stat. 1193, as amended, 43 U.S.C. 485h(c). That section authorized the Secretary "to enter into contracts to furnish

[10] As this Court has recognized, the "estimated cost of construction" cannot usually be determined until the construction of the project is virtually complete, so that water charges must be based on tentative estimates, subject to whatever adjustments later circumstances dictate. See *Ivanhoe Irrigation District* v. *McCracken, supra,* 357 U.S. at 298; see also *Yuma County Water Users' Ass'n* v. *Schlecht,* 262 U.S. 138, 143–144.

water for municipal supply or miscellaneous purposes," and to require payment,

> * * * (1) * * * with interest not exceeding the rate of 3½ per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) * * * at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper * * *.[11]

Thus, not only was the Secretary authorized to include a charge for municipalities that is not included for irrigators—*i.e.*, interest (see p. 31, *supra*)—but he was given broad discretion to determine what would be an "appropriate share" of construction costs or operation and maintenance costs for a municipality to pay.

Congress, moreover, has been fully aware that the Secretary has implemented this statutory authorization to charge municipalities higher rates for project water than irrigators. For example, in the Senate hearings on the 1951 Interior Department appropria-

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[11] With respect to the sale of electric power or the lease of power privileges, the Secretary was authorized to fix "such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper * * *."

tions, the subject of the utilization of project water for municipal purposes came up, and the subcommittee chairman, Senator Hayden, said, "Usually the rate of the municipality for water is higher than the rate for irrigation. I think they probably would be charged more for municipal purposes—it is more valuable to them." Hearings before the Senate Subcommittee on Appropriations, Interior Department, 1951, 81st Cong., 2d Sess., p. 1114. At those same hearings the Department submitted a statement as to the basis of charges for municipal water, which made it clear that such charges are set in accordance "with the particular circumstances under which municipal water has been provided," not in relation to the charges made for irrigation water (*id.* at p. 1115):

> Among other things, these varying circumstances have involved existence of prior municipal water rights * * *, the point of delivery of the water * * *, the purpose for which water was used within the municipal limits (for irrigation, domestic, municipal or industrial uses), the extent to which the municipality contributed to the project by transfer of lands or other rights * * *, the type, extent, and cost of facilities necessary to make municipal water available provided by the United States, who constructed and paid for the construction and operation and maintenance of specified facilities, the degree of permanency of the municipal water right involved, the choice of contract as to repayment or water service, and many other special local considerations.

Furthermore, Congress was expressly advised, as early as 1946, as to the basis for the Secretary's determination of the appropriate charge for municipal water in the Central Valley Project (*i.e.*, $10.00 per acre-foot [12]):

> It is estimated that, under full operation of the authorized project, gross annual revenues from the sale of municipal and industrial water [at this rate] will amount to $680,000, whereof $119,070 will be necessary to support operation, maintenance, and replacement costs, and $560,930 will be available for application to capital costs. This will be sufficient to repay the allocated costs during the project repayment period, plus 3 percent interest on the unpaid balance, and to meet an appropriate share of other fixed costs of the project water supply.

H. Doc. No. 146, 80th Cong., 1st Sess., p. 19, quoted in 1 Central Valley Project Documents, H. Doc. No. 416, 84th Cong., 2d Sess., pp. 595–596. Congress was also advised as to the reasonableness of this rate (*id.* at p. 595):

> This rate may be judged by comparison with prevailing rates in areas adjacent to those where sales are contemplated. The principal alternative source sells water on a rate schedule varying from $52.27 to $95.83 per acre-foot within its district, depending on the amount used and exclusive of meter service charges. This water is treated, but the cost of treatment will not exceed $10 per acre-foot. * * *

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[12] See pp. 6, 9, n. 4, *supra*.

In short, in this, as in all aspects of the Central Valley Project, Congress was kept fully informed, and, with full knowledge of what had been done and what was planned, Congress continued to appropriate funds and to authorize expansion of the project by adding new elements (see Pet. Br., *Dugan* v. *Rank*, No. 31, pp. 44–46).

The prime purpose of the reclamation laws and of the projects authorized and constructed under them has been the promotion of irrigation. See, *e.g.*, Reclamation Act of 1902, Section 1, 32 Stat. 388, as amended, 43 U.S.C. 391; *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 731–742. Other purposes—navigation, flood control, salinity prevention, recreation and fish and wildlife preservation—and other uses of project water, such as for domestic, municipal, industrial and power purposes, are clearly incidental to that central aim. Indeed, the Reclamation Project Act of 1939, 53 Stat. 1193, as amended, 43 U.S.C. 485h(c), provides that "[n]o contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes." Accordingly, it cannot be said that Congress was acting unreasonably when it determined that irrigation should receive a substantial subsidy in the form of non-payment of interest, while other uses should receive little or no such bounty. See *Ivanhoe Irrigation District* v. *McCracken, supra*, 357 U.S. at 295–296. Fresno's claim that it should receive the

same subsidy, rather than being expected to pay an "appropriate share" of the cost of bringing it municipal water, is without the slightest warrant in either the Constitution or any Act of Congress.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed insofar as it sustained the claims that the City of Fresno pressed in common with the other plaintiffs in this proceeding (see pp. 11–22, *supra*) and affirmed insofar as it directed the dismissal of those claims that the City of Fresno alone advanced (see pp. 22–36, *supra*).

Respectfully submitted,

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